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January 28, 2003

**VIA ELECTRONIC FILING**

Chairman Michael K. Powell  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Re: UNE Triennial Review, Docket WC 01-338: Necessity of Unbundled  
Dark Fiber Loops

Dear Chairman Powell:

Dominion Telecom, Inc. ("Dominion"), by its attorneys, submits this *ex parte* letter in the above-captioned *UNE Triennial Review* proceeding to urge the Commission to ensure that all requesting telecommunications carriers, including competitive local exchange carriers ("CLECs"), obtain efficient, nondiscriminatory access to unbundled dark fiber loops. Specifically, Dominion will demonstrate, as several other carriers have successfully done,<sup>1</sup> that dark fiber loops amply meet the statutory impairment standard under Section 251(d)(2), and therefore that the Commission should continue to include it on the list of mandatory unbundled network elements ("UNEs"). In addition, Dominion will discuss the lingering obstacles that incumbent LECs ("ILECs") are creating to hinder competing carriers' ability to obtain dark fiber loops, and will propose modest alterations to the Commission's rules to remove these obstacles, making dark fiber loops available in a commercially meaningful way.

<sup>1</sup> E.g., Joint Comments of NuVox, KMC, e.spire, TDS Metrocom, MFN, and SNIPLINK, Docket No. 01-338, at 77-80 (filed Apr. 5, 2002) ("CLEC Coalition Comments"); Joint Reply Comments of NuVox, KMC, e.spire, TDS Metrocom, MFN, and SNIPLINK, at 53-57 (filed July 17, 2002) ("CLEC Coalition Reply Comments"); *Ex Parte* Presentation of El Paso Networks, LLC and Conversant Communications, LLC, Docket Nos. 01-338 *et al.* (Nov. 26, 2002) ("El Paso *Ex Parte*"); Letter from Lawrence R. Freedman, Counsel for Norlight Telecommunications, Inc. to Marlene Dortch, Secretary, FCC, Docket Nos. 01-338 *et al.* (filed Dec. 20, 2002) ("Norlight *Ex Parte*").

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## **BACKGROUND**

Dominion is a facilities-based telecommunications carrier, incorporated in Virginia, that is certified in 16 states as both a CLEC and interexchange carrier ("IXC"). Founded in 1997, Dominion's initial market for entry was long-haul, private line, point-to-point optical bandwidth services, typically large capacity circuits used by other telecommunications carriers and information service providers. More recently, Dominion has supplemented its carrier product offerings with advanced services for business customers, supporting the provision of point-to-point broadband services to end-user customers with large telecommunications capacity requirements, such as commercial, governmental, and financial institutions in the trans-Atlantic region. Dominion has targeted a number of cities on its network for those services, including second- and third-tier cities in the Atlantic region. Dominion has to date invested over \$600 million in its network, amassing over 10,000 route miles (300,000 fiber miles) of facilities. We will continue to invest in facilities — our 2003 budget includes the addition of 6,000 route miles of fiber — as customer demand for interexchange and advanced services grows.

In order to provide existing and innovative new advanced services to customers, Dominion must have cost-effective access to "last mile" facilities to interconnect with its extensive backbone network. Dominion estimates that it may require over 1000 local connections during the near term, a large proportion of which will be reachable only over dark fiber. Thus, Dominion's planned buildout requires access to dark fiber loops from the ILECs at TELRIC rates. If these loops are removed from the UNE list, or are not provisioned in an efficient, nondiscriminatory manner at TELRIC rates, Dominion will not be able to fully utilize its network, and its entry into new markets could be severely curtailed. This result would deprive hundreds of potential business customers in Tier 2 and 3 cities, many of whom presently have no choice of service provider, from receiving Dominion's innovative, productivity-enhancing services.

## **DISCUSSION**

Section 251(d)(2) of the Telecommunications Act of 1996 ("1996 Act") requires the Commission to determine "what network elements" should be made available by ILECs to requesting carriers pursuant to Section 251(c)(3). In making that determination, the Commission must consider whether denying a requesting carrier access to a particular network element would "impair" that carrier's ability to provide the services that it seeks to offer.<sup>2</sup> Under existing Commission rules, dark fiber loops have been deemed to meet this test and, therefore, they must be unbundled.<sup>3</sup> The Commission initiated this proceeding based on its promise to engage in a three-year review of the UNE rules, and in doing so it will address issues raised by the D.C.

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<sup>2</sup> See 47 U.S.C. § 251(d)(2) ("In determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider, at a minimum, whether ... the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.").

<sup>3</sup> 47 C.F.R. § 51.319(a)(1).

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Circuit's remand of its UNE rules in *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA*"). The *USTA* court instructed the Commission to establish an impairment standard that "point[s] to something a bit more concrete"<sup>4</sup> than does its existing analysis, specifically with regard to the competitive need for a particular element. As many have shown, and Dominion itself demonstrates here, dark fiber is so crucial that it not only meets the current impairment standard, but will satisfy virtually any unbundling standard adopted in this proceeding.

***Section 251(d)(2) Requires Unbundled Access to Dark Fiber***

In 1998, the Commission unequivocally held that "unbundling dark fiber is essential for competition in the provision of advanced services."<sup>5</sup> Reasoning that "unbundled loops, including fiber, allow competitive LECs to build out their networks gradually,"<sup>6</sup> the Commission held that "access to the full capabilities of incumbent LECs' loop plant nationwide will further the goals of the Act."<sup>7</sup> The Commission therefore ordered that dark fiber loops must be unbundled "nationwide."<sup>8</sup>

The Commission found that dark fiber loops must not be distinguished from "lit" loops for purposes of applying Section 252 impairment analysis. That is, the expense and delay of self-provisioning loops applies regardless of whether the corresponding ILEC loop facility is dark or lit.<sup>9</sup> Although Dominion agrees that dark fiber loops should be categorized as one type of loop for purposes of Commission rules,<sup>10</sup> it must emphasize that, for purposes of impairment analysis, dark fiber is a particular type of facility that is especially crucial for competitive entry in largely unserved or underserved areas.

Loops have been recognized even by Congress as a key facility for the creation of telecommunications competition.<sup>11</sup> The Commission has understood for years that the ILECs' local loop architecture cannot be replicated absent extraordinary time and expense. Accordingly, the Commission has repeatedly recognized that competitors cannot reasonably be expected to replicate local loops,<sup>12</sup> as such an effort "would be extremely difficult for competitive LECs ...

<sup>4</sup> *USTA*, 290 F.3d at 425.

<sup>5</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order, 16 FCC Rcd. 3696, 3785 ¶ 196 (1998) ("*UNE Remand Order*").

<sup>6</sup> *UNE Remand Order*, 15 FCC Rcd. at 3785 ¶ 197.

<sup>7</sup> *Id.*, 15 FCC Rcd. at 3786 ¶ 200.

<sup>8</sup> *Id.*, 15 FCC Rcd. at 3786 ¶ 200.

<sup>9</sup> *See id.*, 15 FCC Rcd. at 3785 ¶ 196.

<sup>10</sup> Dominion understands that the Commission is considering whether to impose use restrictions on local loops. Even were use restrictions lawful under the plain language of Section 251(c)(3), which Dominion does not concede, such use restrictions would not be appropriate for dark fiber loops because these facilities are not yet in use by the ILEC and therefore cannot be deemed to bypass existing local access arrangements.

<sup>11</sup> The House Conference Report to the 1996 Act states that "the term 'network element' was included to describe the facilities, such as local loops" that an ILEC "must provide for certain purposes under" Section 251. H. CONF. REP. NO. 104-458, 104<sup>th</sup> Cong., 2d Sess. at 116 (1996).

<sup>12</sup> *UNE Remand Order*, 15 FCC Rcd. at 3779 ¶ 183.

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even to serve businesses in urban districts.”<sup>13</sup> A full loop “overbuild” would “embroil the competitor in lengthy rights-of-way disputes, and would require the unnecessary digging up of streets.”<sup>14</sup> Even if such a project were technically and politically feasible, it is “prohibitively expensive and time-consuming.”<sup>15</sup> In a best-case scenario, the competitor would incur an enormous up-front capital expenditure and would incur delays potentially extending a year or more in reaching customers.

The problems identified by the Commission with respect to loop architecture are present in both the self-provisioning and the third-party vendor context, and, in Dominion’s experience, they persist to this day. As a practical matter, building loop plant continues to be, in most cases, prohibitively expensive and time consuming. Dominion’s deployment figures show that installing fiber loops costs \$20 per foot in Tier 3 and 4 cities, and well over \$100 per foot in Tier 1 cities such as New York. These figures do not include franchise and right-of-way fees, which cost a minimum of \$15,000 per year in Atlanta and \$200,000 per year in New York City.<sup>16</sup> It remains unreasonable to expect a new entrant to invest large sums of capital (or for Wall Street to invest such sums) to build loop plant (ubiquitous or even quite limited) before the entrant has secured a substantial and secure customer base and revenue stream. Under these circumstances, no loop — dark or lit — can be substituted with self-provisioning “as a practical, economic, and operational matter,” which entails mandatory unbundling.<sup>17</sup>

Dark fiber loops are especially critical because they often are located in areas where few or no competitors presently serve customers. This fact is true of many of Dominion’s targeted customers. Indeed, the fact that these loops lie fallow is indication that the ILEC has not perceived significant demand for “last mile” transmission capacity. Thus, if the Commission were to relax or abolish dark fiber unbundling, it would guarantee that many largely unserved or under-served areas continue to be denied competitive telecommunications choices. And the higher productivity that the customers of Dominion and others would enjoy by virtue of competitive services will in all likelihood be lost. This result flatly contravenes the 1996 Act.<sup>18</sup> Thus, dark fiber loops patently qualify under Section 251(d)(2) — even under the *USTA* court’s analysis — and must remain unbundled.

<sup>13</sup> *UNE Remand Order*, 15 FCC Rcd. at 3780, ¶ 185.

<sup>14</sup> *Id.*, 15 FCC Rcd. at 3781 ¶ 186. The right-of-way issue has proved a significant obstacle to competitive deployment, causing the Commission to devote its rulemaking authority to its resolution. See *Third Advanced Services Report*, ¶ 166 & n. 375.

<sup>15</sup> *UNE Remand Order*, 15 FCC Rcd. at 3780 ¶ 183.

<sup>16</sup> Dominion presently pays for franchises in 30 locations, but would require a great deal more if it were forced to build out last mile facilities to new customers.

<sup>17</sup> *UNE Remand Order*, 15 FCC Rcd. at 3846 ¶ 333.

<sup>18</sup> The legislative history of the 1996 Act emphasizes Congress’s goals of bringing more innovative, lower-cost telecommunications services to Americans through the introduction of competition: “Technological advances would be more rapid and services would be more widely available and at lower prices if telecommunications markets were competitive rather than regulated monopolies.” H.R. REP. NO. 104-104, 104<sup>th</sup> Cong., 2d Sess. at 48 (1996).

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As several members of Congress recently observed in their letter to yourself and fellow Commissioners, the outcome of the *UNE Triennial* proceeding will have a profound effect on the nation's consumers and small businesses.<sup>19</sup> Were the Commission to, as these representatives put it, "unilaterally dismantle the open network provisions of the 1996 Act," that effect would be harmful and irreversible. This result would certainly occur if the Commission no longer requires the unbundling of dark fiber loops.

***The Commission Should Clarify Rule 51.319(a)(1) to Ensure Efficient, Nondiscriminatory Access to Dark Fiber Loops***

Despite the Commission's standing order that dark fiber loops must be unbundled for any requesting carriers at TELRIC rates, certain ILECs have maintained policies and practices that render them functionally unavailable. By manipulating the "definition" of dark fiber, feigning ignorance as to the capacity and location of facilities, and refusing to connect non-contiguous facilities, some ILECs have in fact blocked requesting carriers from leasing dark fiber loops. Dominion therefore suggests modest amendments to existing Rule 51.319(a)(1), the definition of loops, to forbid the continuation of such restrictive practices.

**The Definition of Dark Fiber Must Include Loops Not Terminated on ILEC Equipment**

The Commission's dark fiber unbundling requirement is based on the industry standard definition: dark fiber is "[u]nused fiber through which no light is transmitted, or installed fiber optic cable not carrying a signal."<sup>20</sup> In other words, any loop not presently used to serve a customer is "dark," yet remains subject to the same unbundling requirements applicable to operating loops. Despite this broad definition, ILECs have applied a different, more restrictive definition that has the effect of denying access to the vast bulk of dark fiber loops: any loop not terminated on ILEC equipment is not dark fiber and need not be unbundled at all.<sup>21</sup>

As is plain from the definition adopted in the *UNE Remand Order*, the ILECs have assumed, without basis, an incorrect and overly restrictive definition of dark fiber. That definition allows the ILECs to avoid compliance with unbundling obligations simply by changing their standard loop provisioning practice, that is, to lay new loop fiber without terminating it. The ILECs plainly are making a distinction without a difference: the clear object of the dark fiber unbundling rule is to make as much loop fiber available to competitors as possible, without artificial distinctions as to whether the loop is in use. Moreover, condoning such self-regulation by any carrier undermines the Commission's authority to implement and enforce Congress's mandates. Dominion therefore provides a proposed amendment to Rule

<sup>19</sup> Letter from Rep. John Conyers, Jr., *et al.* to Michael K. Powell, Chairman, FCC (January 24, 2003).

<sup>20</sup> *UNE Remand Order*, 15 FCC Rcd. at 3771 n.292 (quoting Harry Newton, Newton's Telecom Dictionary, 14<sup>th</sup> Ed. at 197-98 (Flatiron Publishing, New York, 1998)).

<sup>21</sup> Several CLECs have discussed this practice. *E.g.*, CLEC Coalition Reply Comments at 55; Norlight *Ex Parte* at 5-6; El Paso *Ex Parte* at 2-3.

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51.319 that will codify the Commission's definition of dark fiber, as articulated in the *UNE Remand*, to prevent such practices.

ILECs Must Provide Complete Information About Dark Fiber to Requesting CLECs

As many commenters have stated throughout this proceeding, rules mandating the unbundling of loops have little competitive force if not accompanied by rules mandating the provisioning of loop information. For this reason, the Commission has imposed sophisticated rules that require ILECs to provide information about local loops to requesting carriers, including their location, composition (for example, copper or fiber), and electrical parameters.<sup>22</sup> These rules have been instrumental in the development of the competitive broadband industry, and most notably competitive Digital Subscriber Line (DSL) services.

In the context of dark fiber loops, however, the ILECs do not observe the same information requirements. As a result, requesting carriers are unable to obtain dark fiber loop information — most importantly, its location — except in response to a completed loop order. This system has devolved into a cumbersome guessing game,<sup>23</sup> preventing CLECs from planning their deployment and denying them efficient access to dark fiber loops. Given that ILECs are presently required to provide, and have provided, loop information for xDSL-capable loops, it seems self-evident that ILECs do possess some measure of information about the location of dark fiber loops. Several state commissions have thus held that failure to provide dark fiber information is discriminatory, and have imposed specific information provisioning requirements.<sup>24</sup> Dominion therefore suggests that, to ensure national uniformity of rules, the Commission amend Rule 51.319 to require the same type of information availability for dark fiber loops that presently applies to loops already in use.

Dark Fiber Provisioning Obligations Must Include "Patch-Through" Arrangements

Finally, the provisioning of dark fiber has been significantly restricted due to the ILECs' refusal to connect non-contiguous strands of dark fiber to create a complete circuit. Presently, ILECs, notably Verizon, will not provide such a complete circuit even where two strands terminate to the same wire center or other centralized location.<sup>25</sup> ILECs will, however, splice these dark fiber strands together for their own use, rendering their subsequent refusals unreasonable and discriminatory. As is the case with dark fiber loop information, several state commissions have adopted dark fiber splicing requirements for this reason.<sup>26</sup> Dominion suggests that the Commission should adopt similar rules as a matter of federal law, in order to ensure that its existing rules for dark fiber unbundling are followed as a matter of ILEC practice.

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<sup>22</sup> See *UNE Remand Order*, 15 FCC Rcd. at 3885-86 ¶ 427-430.

<sup>23</sup> The CLEC Coalition has termed this process a "game of 'Battleship.'" CLEC Coalition Comments at 54.

<sup>24</sup> See *El Paso Ex Parte* at 7.

<sup>25</sup> See CLEC Coalition Reply Comments at 55-56. See also *Norlight Ex Parte* at 7; *El Paso Ex Parte* at 3-4.

<sup>26</sup> See *El Paso Ex Parte* at 5.

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***Proposed Amended Rule 51.319(a)(1)***

Dominion proposes the following amended Rule 51.319 to remedy the provisioning failures described above. New language appears in bold. Existing language governs where no replacement is supplied.

(a) Local loop and subloop. \* \* \*

(1) The local loop network element is defined as a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office, **whether or not terminated to that equipment**, and the loop demarcation point at an end-user customer premises, **whether or not connected to equipment**, including inside wire owned by the incumbent LEC. The local loop network element includes all features, functions, and capabilities of such transmission facility. Those features, functions, and capabilities include, but are not limited to, dark fiber .... \* \* \*

(i) **Dark fiber. No carrier will be deemed in compliance with the requirements of this subsection unless they provide all requesting carriers, wherever technically feasible, with (x) information about dark fiber loop facilities, including its location, transmission capability, and physical composition, in a just, reasonable and nondiscriminatory manner, and (y) completed physical connections between non-contiguous strands of dark fiber loops if a complete and contiguous dark fiber loop facility does not exist or is not available.**

**CONCLUSION**

The role of dark fiber in enabling the growth of competition demonstrates that its absence would materially impair CLECs in providing competitive services to American consumers. The Commission therefore should retain dark fiber loops as an element that must be provided on an unbundled basis, and should adopt Dominion's proposed amendments to Rule 51.319 to ensure that dark fiber loops are provisioned in just, reasonable and nondiscriminatory manner in keeping with Congress's mandates in Section 251.

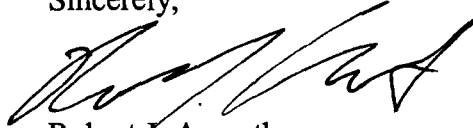
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